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THE RISE OF NATIONALITY.

In a late editorial we called attention to the fact that England, with all her wide domain, was far better governed than our own land, not because we believe that her form of government is a better one, but because the functions of her government are in far better control, in short, her due process of law is much better than our own.

When our constitution was adopted, the makers of it had no idea that the states represented were consenting to a unification of interests which would prevent a withdrawal from the compact entered into by any one or more states. The Virginia compromise and later the Kentucky resolutions demonstrated that it would have been impossible to have formed the union upon such a basis as that there might arise a condition in which a state would not be permitted to withdraw from that union. Calhoun shows, with irresistible logic, that the constitution was adopted with a thorough understanding that a condition might arise which a state could take advantage of to withdraw from the union. When the constitution was adopted the colonies had just passed through eight years of fearful hardships which had been brought on by an obstinate monarch and a subservient ministry of a centralized government. The idea of forming another centralized government which might bring upon the colonies such hardships as had been so long borne, was revolting in the extreme, and for week in and week out, the representatives of the various colonies wrangled over the provisions of the constitution, with such little hope of success, that Benjamin Franklin, who was inclined to skepticism, urged the invocation of divine power to bring the discordant elements together.

Nothing can be more certain than that there would have been no union, had the question been understood to mean that the colonies were proposing to enter into an irrevocable compact. We have no doubt but that Ham-

ilton regarded the compact entered into as one which would one day develop into a union, "one and inseparable." It remained for Webster, however, with a deep insight, to portray the manner in which the elements of nationality, which were gathered at the making of the constitution, had become so amalgamated as to produce such a nation as Hamilton dreamed of. The writer of this article is constrained to admit that Hamilton understood the fundamentals better than any man at the convention at Philadelphia, which wrought out our great scheme of government. The greatness of Alexander Hamilton, as a statesman, becomes more and more apparent as the decades have rolled on into a century and more.

The scheme of our government has proven even better than its makers knew. As the country developed through the masterful efforts of its citizens in all states, so, also developed the element which was to make South Carolina and Massachusetts forget, that, "shoulder to shoulder they went through the Revolution; hand in hand they stood round the administration of Washington and felt his great arm lean on them for support;" and that, "bones of their sons, falling in the great struggle for independence, were mingled with the soil of every state from New England to Georgia." Little did the makers dream that their grandchildren were doomed to settle the question as to whether a nation had been built around that constitution or that the tie which bound them was but a rope of sand, by a five years bloody conflict in which father was to be pitted against son and brother against brother.

But after the battles of San Juan Hill, Santiago and Manila, no one but a crank could see any disloyalty in mingling the folds of emblem of the confederacy with those of the stars and stripes; for, had not the sons of Massachusetts again marched shoulder to shoulder with the sons of South Carolina, in freedom's cause? For the country was then for the first time one and indissolubly one, in spirit as well as in name; and America arose to "a nationality." Since this time indeed we can date the feeling among the people which has been growing stronger as each succeeding year rolls by that the principal affairs of government are transacted and regulated by their representatives at Washington, execu-

tive, judicial and legislative; and that it is to such authority they are to look in the future for protection against enemies and evil conditions at home as well as abroad.

Should the states, therefore, fear the centralization of power in a government which the representatives of all the states are to control and direct? How else can we expect adequate protection. The great corporations whose business extends over the nation and upon which the nation has come in large measure to depend, it would seem, should be managed and can only be properly regulated by a united policy which the representatives from all the states have a right to direct and control, and which can be properly and effectively enforced.

The railroads and telegraph lines, for instance, which bring our broad domains close together, are the great prime factors of the nation's commerce, and therefore national affairs, far beyond the power of any state to regulate or control. Upon their proper regulation depends the welfare of the nation itself. Interfere with their functions and the nation is in disorder. They are controlled by a few men who employ millions of men and women and these millions themselves form corporate unions called "labor unions" which extend the length and breadth of the nation and are endeavoring at the present time to control the corporations by which they are employed. Are not all these national affairs? Why, then, should the states be making such a fuss because of the fear that these national affairs may require practically the exclusive control over them by the federal government.

In the telegraphers strike, for instance, we are made to feel a power as tyrannical as that which the capitalists themselves have displayed. The states themselves are powerless to control the depredations of these giant labor trusts, and private business concerns located in Connecticut and Missouri have recently been compelled to go to the Supreme Court at Washington to seek out a remedy which will be effective against a conspiracy which is national in scope and which no state can possibly cope with any more successfully than with the gigantic conspiracies of capital whose only effective regulation has been through the vigorous enforcement by the national government of the Sherman Act and the Elkins Law.

The condition which confronts us, is not a question of the encroachment of the federal upon the state powers, but how shall we best control these national corporate growths and conspiracies which threaten the general welfare of the nation. The whole force of England may at once be appealed to in case of need and her laws are uniform. The encroachments of corporate tyranny, whether it be of capital or labor, upon the commerce which the general welfare of the nation requires to be kept free from interference, must be met with the force of the national government through a uniform system of procedure and the best interest of the individual states will be promoted by conceding such powers to the federal government. We will discuss the laws in our next editorial relating to these questions.

NOTES OF IMPORTANT DECISIONS.

WITNESSES—INCOMPETENCY OF STENOGRAPHER'S TRANSCRIPT OF PREVIOUS TESTIMONY AS GROUND FOR IMPEACHMENT.—A very important question is decided in the recent case of *Prewitt v. Southwestern Telegraph & Telephone Co.*, 101 S. W. Rep. 812, where the Court of Appeals of Texas holds that it is improper to admit in evidence a transcript of the official stenographer's notes of a witness' testimony taken at a former trial, where it is not signed by him or otherwise certified by him to be correct. The court on this question argues as follows: "We are of the opinion that it was improper to admit in evidence, over appellant's objection, the transcript of the stenographer's notes of the testimony taken upon the former trial. The testimony of the former trial had been taken down by the official stenographer and a copy or transcript of the notes made, some time afterwards, for the use of appellee's counsel. The stenographer testified that such transcript was a correct copy from his notes and that his stenographic notes contained a true and correct statement of the evidence as taken down at the trial. There appears to be some conflict in the authorities upon the point, but we are inclined to hold that such paper is not admissible for the purpose of showing the testimony of a witness. If it was admissible in the present case, we see no reason why, for the same reason, in case of the death of a witness, his entire testimony upon a former trial could not be shown by such transcript of the stenographer's notes. Such is not the law with respect to a mere written statement of a witness' testimony taken down at the time of the trial, and not signed by him, or otherwise certified by him to be correct. The legislature, in providing for the appoint-

ment of official stenographers, and the taking down of the testimony by them, has not seen proper to provide for such use of the stenographer's notes, or a transcript thereof, and, in the absence of such provision, we are not disposed to treat them otherwise than as a written statement of the testimony of the witness taken down at the time, but not signed, or certified by him in any way to be correct. § Wigmore, Ev., § 1669."

TRIAL AND PROCEDURE—THE "AMBULATORY RULE" DENIED BY COMPELLING A PARTY TO PLEAD HIS CASE AS HE EXPECTS TO PROVE IT.—What Mr. Hughes in a recent article in this Journal (64 Cent. L. J. 123), denominated the "Ambulatory Rule," is a rule of procedure upheld in some states which desire to be extremely "liberal" in their methods of pleading or procedure, by which a party may plead one thing and if his *pro f* show something different have the case submitted to the jury on the theory made out by the evidence rather than that stated by the pleadings, or after appeal to be allowed to amend his pleadings to conform to the nature of his proof and try the case again on the new theory. This rule is also called the "theory of the case" rule and as such has often been discussed in the columns of this Journal: It is quite easy for a court to fall in with the popular notion that rules of procedure are arbitrary and technical and should therefore be disregarded wherever "exact justice" would be denied, as if "exact justice" depended upon the facts of any particular case rather than on the principles of procedure approved by the experience of centuries. It is, therefore, with considerable pleasure that we observe a decision such as that in the recent case of *Ingold v. Symonds*, 111 N. W. Rep. 802, where the Supreme Court of Iowa holds that a plaintiff cannot try a case on one theory and then after the supreme court has pointed out his error go back, amend his pleadings and try his case on another theory. In this case it appeared that an agent given the exclusive right to procure a purchaser for a farm sued for commissions, alleging that the owner had breached the contract by himself selling the land. At the time suit was commenced the agent knew that the owner had sold at public auction through the medium of an auctioneer. The court held that the agent after being defeated in the suit could not amend his pleadings, and proceed on the theory that he was entitled to commissions because the contract was breached by the owner selling through an auctioneer. The opinion of the court written by Justice Sherwin is instructive and we quote from the observations of the learned judge on this particular question in the case as follows: "This is the second appeal in this case. The opinion on the first appeal is reported in 125 Iowa, 83, 99 N. W. Rep. 713, where a sufficient statement of the facts may be found. After the case went back for retrial the plaintiff amended his pleadings by alleging that the sale made by the defendants was

made by an auctioneer at a public sale, acting as the defendants' agent, and that by selling through such agent the defendants had breached their contract exclusively authorizing the plaintiff to procure a purchaser within a certain time. On the former appeal we held that, while the plaintiff's contract gave him the exclusive right to find a purchaser for the property, the defendants had the right to make the sale thereof themselves, and we reversed the case because of an instruction of the trial court directing the jury to the contrary. The facts appearing in the first trial as well as in this one, and they are not denied, are that, after the defendants had executed the contract of agency with the plaintiff, they advertised the sale of the farm and personal property at auction. They procured auctioneers to do the selling for them, and the land in question was, in fact, sold at public vendue by one of these auctioneers, and one of the questions presented by the appeal is whether the defendants had the right to so sell their land in view of their contract with the plaintiff. However, we deem this question of minor importance in this particular instance, because of the attitude of the plaintiff upon the first trial of the case. He was present at the sale of the land, and, of course, knew the manner of its sale and the instrumentality employed by the defendants to effect the same before he commenced this action; yet his original pleadings being the ones upon which the case was first tried, no claim was made that there had been a breach of the contract because of a sale of the property through another agent, and the former trial, both in the district court and on appeal to this court, was conducted along the lines we have indicated. It is a well settled legal principle that a party to litigation may not split his causes of action and try a case by piecemeal; in other words, he may not present one branch of his case for the determination of the court, and, when unsuccessful therein, begin over again presenting some other matter upon which he relies which might have been presented and determined theretofore. The law will not tolerate the multiplicity of suits growing out of such practice, but requires a party to present his entire claim or demand in one action, and, if he fails to do so, but chooses rather to take his chances on a presentation of a part thereof, he is estopped from further prosecuting the same demand either by an independent action or by an amendment to pleadings, which amounted to practically the same thing. *Zalesky v. Home Ins. Co.*, 114 Iowa, 516, 87 N. W. Rep. 428; *Hodge v. Shaw*, 85 Iowa, 137, 52 N. W. Rep. 8, 39 Am. St. Rep. 290. The plaintiff herein, as we have heretofore shown, knew all about the sale of this land by the auctioneer long before this suit was commenced, and made no claim on account thereof until after this court had determined by its opinion on the former appeal that the defendants themselves had the legal right to sell the farm notwithstanding the plaintiff's contract. This determination of the question ope-

rates to defeat any recovery on the part of the plaintiff on the issues made on the first trial; and to now permit the plaintiff to 'mend his hold,' by pleading the creation of another agency and the sale of the land through it would be to permit him to present his case in sections and to continually subject the defendants to the expenses of a relitigation of a question that should have been presented and determined on the former trial."

THE DOCTRINE OF ERROR OF JUDGMENT IN THE LAW OF NEGLIGENCE.

1. Broadly speaking, a person placed in a position of danger must use ordinary care to protect himself, and if he fails to do so and is injured, he cannot recover therefor, even though the person responsible for his condition is guilty of negligence. But this general statement leaves to be determined by the trier of fact what is the ordinary care required under all the circumstances of a given case.¹ When the result of the negligent act of a person is to place another in a dangerous situation requiring immediate and rapid action, with little or no time to deliberate as to the better course to pursue, the latter is not held to that strict accountability of conduct required of one situated under more favorable circumstances. Contributory negligence is not necessarily chargeable to a person upon his failure to exercise the greatest prudence or best judgment in cases where he is required to act suddenly or in an emergency.² If he acts erroneously through fright or excitement induced by another's negligence, or adopts a perilous alternative in the endeavor to avoid an injury threatened by such negligence, or when he acts mistakenly in endeavoring to avoid an unexpected danger negligently caused by another, he is not guilty of contributory negligence as a matter of law.³ Reasonable allowance is, and should always be, made for the circumstances of the case; and if a person is suddenly put in peril, without sufficient time to consider all the circum-

stances, he should be excusable for omitting some precautions or making an unwise choice, under conditions so well calculated to disturb the mind.⁴ "Where one" it has been said, "without his own fault, is, through the negligence of another, put in such apparent danger as to cause him terror, loss of self possession and bewilderment, and as a natural consequence thereof, he, in attempting to escape, puts himself in a more dangerous position, he is not, as a matter of law, chargeable with contributory negligence that will prevent him from recovering damages for the injury. The obligation resting upon him to exercise due care for his own safety, does not require him to act with the same deliberation and foresight which might be required of him under ordinary circumstances."⁵ Lord Ellenborough said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."⁶ Thus, if a person should leap from a moving train under the influence of a well grounded fear that a fatal collision is about to take place, his claim against the railroad company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself.⁷ And it will be no defense to such a complaint that the plaintiff was in no actual peril when he jumped from the train, and was therefore guilty of contributory negligence in taking such hasty action.⁸ This is a reasonable principle of law. If the negligence of a person or company operating a train puts a passenger in such a situation that the danger of remaining aboard is apparently as great as would be encountered in jumping from the train, the right to compensation should not be lost by doing the latter. And this is held to be the rule even where the event has shown that the passenger might have remained aboard with a greater degree of safety. The prudence of a passenger's leaving a train in motion to escape an apparent danger must be judged by the circumstances as they appeared

¹ *Galesburg, etc., Co. v. Barlow*, 108 Ill. App. 509; *Junction Mining Co. v. Ench*, 111 Ill. App. 346.

² *Kansas City, etc., R. Co. v. Langley*, 70 Kan. 453, citing *Vallin v. Railroad Co.*, 82 Wis. 1; *Railroad Co. v. Eganoff*, 112 Ill. App. 323; *Traction Co. v. Scott*, 58 N. J. Law, 682; *Harrington v. Railroad Co.*, 140 Cal. 514.

³ *Edgerton v. O'Neal*, 4 Kan. App. 73, 46 Pac. Rep. 206.

⁴ *Momence Stone Co. v. Groves*, 100 Ill. App. 98. See Vol. 1, *Shearman & Redfield on Neg.*, sec. 89.

⁵ *Junction Mining Co. v. Ench*, 111 Ill. App. 346, 351. See *Railroad Co. v. Courson*, 198 Ill. 102; *I. C. R. R. Co. v. Haecker*, 110 Ill. App. 102; *C. C. C. & St. L. R. Co. v. Baker*, 106 Ill. App. 500.

⁶ *Jones v. Boyce*, 1 Stark. 493, 2 E. C. L. 189, *Thomp. Car. of Pass.* 246.

⁷ *Penn. R. Co. v. Aspel*, 23 Pa. St. 147.

⁸ *Selma, etc., R. Co. v. Owen (Ala.)*, 31 So. Rep. 598.

to him at the time and not by the result. It is for the jury, or the judge sitting as jury, to say in view of all the evidence, whether negligence has been satisfactorily shown, and whether the plaintiff has exercised proper care in jumping from a moving train.⁹ "If the jury had found, as they might from the evidence," said the court in a Minnesota case, "that through defendant's negligence the unexpected, sudden, and rapid approach of the car placed Hemberg, without his fault, in a position of apparent peril requiring instant action to escape, and that the peril and shouting by the brakeman and others frightened and bewildered him, so that for the moment he was incapable of deliberating and choosing the safest course to pursue, the defendant cannot allege it as negligence in law on his part, so as to prevent his recovery, that he adopted an unsafe course if it were a natural result of the fright and bewilderment so caused by defendant's negligence, such as might occur to one acting with ordinary prudence. * * * If the jury had been satisfied from the evidence, as they might have been, that the car was run in negligently; that it was not negligence in Hemberg not to see the car till it was close upon him; and if he then ran upon the track, that his doing so was through terror and loss of self-possession caused by defendant's negligence, his doing so was not his negligence."¹⁰ In such cases the defense is of no avail to the defendant that the party injured might have avoided the injury by the exercise of ordinary care and caution. By such defense the fact is lost sight of that the party injured has been placed in a position of peril or sudden surprise whereby he is bereft of independent moral agency and opportunity of reflection by reason of defendant's negligence. In such a case it would be and is against the common judgment of mankind to hold the injured party either morally or legally responsible for contributory negligence.¹¹ Of course, the sudden peril

which will excuse what would otherwise be contributory negligence on the part of the plaintiff, must have been caused by the action of the defendant and not of a third person. The peril caused by the defendant is a very different thing from peril wholly unconnected with the defendant or any of his doings. If a person flees from a vehicle and throws himself under the wheels of a moving car, so that he is injured, no cause of action lies against the owner of the car unless they have been guilty of negligence.¹² But if the defendant gives another reasonable cause for alarm he cannot complain that the person so alarmed has not exercised cool presence of mind; and he will not be permitted to find protection from responsibility for damages resulting from the alarm.¹³ But if he has given timely warning of the peril, and the person receiving such warning, after taking up a position of safety, has abandoned it, and sought some other, and in so doing receives an injury, the defendant can no more be made to answer in damages therefor¹⁴ than he can be held responsible to a person who sustains injury by voluntarily assuming a position of danger, the hazards of which he understands and appreciates.¹⁵ The law, however, does not impose it as a duty upon one, over whom danger impends by the negligence of another, to incur greater danger by delaying his efforts to avoid it until its exact nature and measure are ascertained. The instinctive effort on the part of a person in a position of peril to avoid the injurious consequences thereof will not relieve the defendant from responsibility.¹⁶ Neither does the law require a person to adopt the speediest and best way to extricate himself on the instant he discovers the appalling fact of his peril, as such a conclusion would be abhorrent to our sense of justice.¹⁷

2. *Persons in Peril not Required to Act With Care and Prudence.*—When it is necessary that a person should choose instantly in the face of grave and apparent peril, between two hazards, and he makes such a choice as a

⁹ *Adams v. Railroad Co.*, 74 Mo. 553; *Western Md. R. Co. v. Shirk*, 95 Md. 637, 53 Atl. Rep. 156; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181.

¹⁰ *Mark v. Railroad Co.*, 30 Minn. 493. See *Ind. R. Co. v. Mauer (Ind.)*, 66 N. E. Rep. 156; *Turner v. Buchanan*, 82 Ind. 147; *Clark v. Railroad Co.*, 132 Ind. 199; *Buel v. Railroad Co.*, 31 N. Y. 314; *Dunban, etc., Co. v. Dandelin*, 143 Ill. 410; *Patton v. Railroad Co.*, 96 N. Car. 455.

¹¹ *Chicago, etc., R. Co. v. Becker*, 76 Ill. 25.

¹² *Trowbridge v. Railroad Co. (Va.)*, 19 S. E. Rep. 780.

¹³ *Wesley Coal Co. v. Healer*, 84 Ill. 126; *Richmond, etc., Co. v. Hudgins*, 41 E. E. Rep. 738.

¹⁴ *Gratz v. McKenzie (Wash.)*, 35 Pac. Rep. 377.

¹⁵ *Robinson v. Railroad Co.*, 25 N. Y. Supp. 91.

¹⁶ *Coulter v. American, etc., Co.*, 56 N. Y. 585.

¹⁷ *City v. Hesting*, 83 Ill. 204.

person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance. Even if, in bewilderment, he runs directly into the very danger which he fears and wishes to avoid, he will not be regarded as in fault. Under such circumstances he will not be held to any degree of care.¹⁸ The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent person; and the latter must bear the consequences.¹⁹ To require that one in the midst of peril, or in the presence of impending danger, should act with the prudence of an ordinarily careful man under ordinary circumstances, would be to put a strain on human nature which all experience shows it would not be able to bear.²⁰ If one placed in imminent peril by the negligence of another is required to act with care and prudence, then the imprudent man who is easily alarmed is not protected at all under that state of the case. It is a fact as well known as any other connected with the subject of ordinary care, that a man of prudence under such conditions may at one time act wisely, and at another, being terrified by the sudden danger, will do things that could not be attributed to a person of ordinary prudence, because at the time, under the influence of fear, he is not a prudent person, being deprived of his presence of mind by the perils of his situation.²¹ "In the exigencies of the situation in which he was placed," said the Ohio Supreme Court, "it could neither be expected nor required that he should exercise the same deliberate judgment that prudent persons would exercise where no danger is present, nor make the most judicious choice been hazards. The question in such cases is not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do in the

presence of the existing peril, and is one of fact for the jury."²² Against perils that are merely possible, and not within the compass of reasonable foresight, the law requires no man to make provision; otherwise, a responsibility would be imposed quite beyond human infirmity to escape, and to which no limit could be prescribed.²³

"It is a difficult question at most," said the court in an Illinois case, "to determine what a human being will do when confronted with sudden and unexpected peril of death. There is, perhaps, no ordinary human conduct in such a situation, but it would be as varied as different individualities. These are questions of fact to be decided by a jury from the evidence in each particular case, and unless the court can see that the verdict is plainly against the evidence, or the result of passion or prejudice, or a misconception of the proper effect of the evidence, such verdict should not be disturbed because the person injured might be imagined to be in fault, or that it is not supported by the evidence, especially when it is apparent, as we think it is here, the negligence of the defendant, averred and proved, brought about the confusion of mind that led to the false step of the deceased."²⁴

"There is a doctrine," declared the Alabama Supreme Court, "fully approved by this court to the general effect that where the party injured was suddenly placed by the wrong of the defendant in a position of extreme and imminent peril necessitating to his extrication quick decision and action on his part, he will not be held to the same correctness of judgment and action as if he had time and opportunity to fully consider the situation and to choose the best means of escaping the peril; or, in other words, adopting a formulation of this principle which has been approved by this court, where by the negligence of the defendant, or those for whom he is responsible, the plaintiff has been suddenly placed in a position of extreme peril, and thereupon does an act which under the circumstances known to him he might reasonably think proper, but which those who have a knowledge of all the facts, and time to consider them, are able to see was not in fact the best, the defendant cannot insist that

¹⁸ *Bryant v. Railroad* (Tex.), 46 S. W. Rep. 82; *International R. Co. v. Bryant*, 54 S. W. Rep. 364; *Railroad Co. v. Rogers*, 91 Tex. 52.

¹⁹ *C. & A. R. Co. v. Corson*, 101 Ill. App. 115; *Hoff v. Railroad*, 14 Fed. Rep. 458; *City of Norfolk*, 55 Fed. Rep. 98; *Schneider v. Railroad Co.*, 134 Cal. 482.

²⁰ *Chattanooga R. Co. v. Cooper* (Tenn.), 70 S. W. Rep. 72; *Cannon v. Railroad Co.*, 194 Pa. St. 159, 44 Atl. Rep. 1089.

²¹ *I. G. N. R. Co. v. Neff*, 87 Tex. 303, 308; *D. T. & W. Co. v. Dandelion*, 143 Ill. 409; *C. & A. R. Co. v. Becker*, 70 Ill. 25.

²² *Penn. R. Co. v. Snyder*, 55 Ohio, 342, 364.

²³ *Robinson v. Railroad Co.*, 25 N. Y. Supp. 91.

²⁴ *C. & A. R. Co. v. Corson*, 101 Ill. App. 115, 119.

under the circumstances the plaintiff has been guilty of negligence. 'Perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men.'

* * * And courts in these matters deal only with ordinary people. That is the sort of man which constitutes the standard by which all men and women are to be judged on the question of negligence *vel non*. We 'have no right to expect men to be something more than ordinary men,' but must expect them to be ordinary men, and their actions must in all cases be adjudged upon the assumption that they are ordinary men. The law takes no account of personal idiosyncracies and peculiarities which produce panic without cause and thus lead to negligent and rash action. The test of due care in a given instance is not what the individual involved in that instance would always do under the circumstances, but what a man of ordinary care and prudence would do under the circumstances."²⁵ "If the standard by which the conduct of the imperiled party is to be judged is to be that which a person of ordinary prudence might be expected to do under like circumstances, how can it be determined what a man of prudence would do under such conditions? A jury is presumed from their knowledge of men and their affairs in ordinary transactions to know what a man of ordinary prudence would do under a given state of facts; but when prudence itself is destroyed and judgment yields to sudden impulse, when there is neither time nor capacity to reflect, how can any one say what a man, prudent under ordinary circumstances, would do if he should be so situated? The rule is sound and just which holds the party guilty of negligence responsible for the result, if that negligence has caused another to be surrounded by such circumstances as to him appear to threaten the destruction of his life or serious injury to his person, whether that person be prudent or imprudent, if in an effort to save his life he makes a choice of means from which injury results, and notwithstanding it may turn out that if he had done differently, or had done nothing, he would have escaped injury altogether."²⁶

²⁵ Central, etc., Co. v. Foshee, 125 Ala. 199, 215, 216.
²⁶ Per Brown, J., I. & G. N. R. Co. v. Neff, 87 Tex. 303, 309. See Penn. R. Co. v. Snyder (Ohio), 45 N.

3. May Act Upon Appearances of Danger.

—While the negligence of the defendant will be regarded as the sole juridical cause of the injury, and the plaintiff's error of judgment only its condition, where he is placed in a position of danger without previous negligence on his own part, even though he might have escaped the injury brought upon him had he not acted hastily or mistakenly in the face of such danger,²⁷ there must be either a real danger or the circumstances as they appear to the party at the time must be such as to create in his mind a reasonable apprehension of danger. Otherwise the fright and consequent injuries can hardly be held to have been such a reasonable consequence of the negligence of the defendant as to constitute such negligent act the proximate cause of the injury.²⁸ "It is of no consequence," said the Alabama Court, when considering the action of a passenger who had rushed from a place of safety by the side of a railroad track across the same in front of a locomotive, receiving injuries which resulted in death, "it is of no consequence that she was panic stricken and hence thought she was in danger and that that was her only means of escape. She must have been in danger—which she was not—and she must have reasonably thought the course she took was the best—which she could not have done since there was no ground for so thinking."²⁹ "A reasonably apparent necessity," declared the same court, "for a passenger to leave a moving car, produced by the negligence of the carrier, stands upon the same footing as a real necessity so produced, and the rights

E. Rep. 559; Heath v. Gleen Falls, etc., Co., 36 N. Y. Supp. 22; Canton v. Simpson, 38 N. Y. Supp. 13; Collins v. Davidson, 19 Fed. Rep. 83; Silver Cordite, etc., Co. v. McDonald, 14 Colo. 191; Coal Co. v. Dealer, 84 Ill. 126; Stegrist v. Arnot, 10 Mo. App. 197; Buchanan v. Railroad Co., 52 N. J. Law, 265; Lowery v. Railroad Co., 99 N. Y. 153; Gibbons v. Railroad Co., 155 Pa. 279; City v. Hesing, 83 Ill. 204; Buell v. Railroad Co., 31 N. Y. 314; Indianapolis, etc., Co. v. Stout, 33 Ind. 155; Roll v. Railroad Co., 15 Hun, 496.

²⁷ Dunham, etc., Co. v. Dandelin, 143 Ill. 416; Mommence Stone Co. v. Groves, 100 Ill. App. 98; Rily v. Railroad Co. (Neb.), 95 N. W. Rep. 20; Howell v. Railroad Co. (Mich.), 89 N. W. Rep. 406; 11 Det. Leg. News, 82.

²⁸ Texas Midland R. Co. v. Booth (Tex.), 80 S. W. Rep. 121.

²⁹ Central, etc., R. Co. v. Foshee, 125 Ala. 199, 216. See Penn. R. Co. v. Aspel, 23 Pa. St. 147; Texas Midland R. Co. v. Booth, 80 S. W. Rep. 121; Chattanooga R. Co. v. Cooper (Tenn.), 70 S. W. Rep. 72; Dummer v. Railroad Co., 108 Wis. 589.

and liabilities of the parties are to be adjudged accordingly."³⁰ A person may act upon appearances of danger surrounding him for the purpose of saving his life or avoiding injury, and he will be allowed to recover in case of accident, even though the apparent danger did not in reality exist.³¹ "While deceased," said the Appellate Court of Illinois, "might not, as a matter of fact, have been in a place of peril, it may have seemed to him, under the circumstances which suddenly confronted him, that he was in imminent peril, and therefore not necessarily guilty of contributory negligence."³²

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³⁰ Selma, etc., R. Co. v. Owen, 31 So. Rep. 598, 601.

³¹ Bryant v. Railroad Co., 19 Tex. Civ. App. 88.

³² C. & G. T. R. Co. v. Kinnare, 76 Ill. App. 394, 399.

MUNICIPAL CORPORATIONS—REQUIRED USE OF PATENTED MATERIALS IN PAVING CONTRACTS.

LACOSTE v. CITY OF NEW ORLEANS.

Supreme Court of Louisiana, June 21, 1907.

The fact that a pavement is patented is no obstacle to full and fair competition upon a municipal contract for the laying of it, when the patentee has filed with the city authorities an agreement to let the successful competitor for the contract have the free use of the patent upon payment of a fixed royalty, thereby placing all prospective competitors upon an equal footing; it appearing that the royalty thus exacted was reasonable, and did not destroy the margin of profit under the contract.

It is no answer to say that the patentee can underbid his competitors for the contract. To him, as to the other bidders, the sole inducement for bidding on the contract is the margin of profit which he sees in it, and for him, as for all others, this margin of profit begins only after the royalty has been paid.

PROVOSTY, J.: The charter of the city of New Orleans requires that all of the contracts of the city for an amount exceeding \$500 shall be let to the lowest responsible bidder after advertisement, with right to reject any and all bids. By the same charter, when the property owners along a street are to share in the expense of paving the street, they have the right to determine "the character or quality of said pavement." The property owners along Dumaine street, in said city, petitioned the council for the paving of said street, and chose the "bitulithic" pavement. After regular advertisement, etc., the city let the contract to the Southern Bitulithic Company; it being the lowest bidder. "Bitulithic" is the name of a particular kind of pavement of

the invention of Warren Bros., of Boston, Mass., and accordingly the city authorities, in advertising and awarding the contract, framed the specifications in such way as to necessitate the use of the processes and materials pertaining to said invention. The evidence shows that there is no other way of laying "bitulithic" pavement or any so-called "bitulithic" pavement. These processes and materials are protected by letters patent; and this has led the plaintiff, a property owner on said street, to bring the present suit enjoining the carrying out of the contract, on the ground that it was let without competition, because it calls for the use of patented processes and materials. To obviate that very objection, and to put all competitors for the contract on an equal footing, the patentees had filed with the city a document in which they agreed to let the successful bidder have the use of their patents, and to furnish expert inspectors to see that the materials were prepared, and the pavement laid according to formula, for 25 cents per square yard.

The question presented is whether an agreement of that kind makes competition possible.

The evidence shows that it secures to all prospective bidders for the contract the use of the patents in question upon payment of 25 cents royalty. The argument of the learned *amicus curiae* to the contrary is founded upon a misconception of the proven facts.

Where such a document is filed, therefore, all prospective bidders are placed on the same footing, and the situation is precisely the same as if a patented process did not have to be used, except that 25 cents per yard additional must be figured into the cost of fulfilling the contract. But all competitors are under the same necessity of making this addition to their estimate, and hence no inequality is created.

Having to pay this royalty could prevent full and fair competition only if thereby inequality were created between the competitors; and it is argued that inequality is thereby created because the patentee does not have to pay that royalty to himself, and may therefore, either in his own name or through some *alter ego*, underbid his competitors. But that argument is merely specious. To the patentee, as to all other bidders, the sole inducement to bid on the contract is the margin of profit which he thinks he sees in it; and no more for him than for anyone else does his royalty enter into that margin of profit. For all others that margin of profit begins after payment of the royalty to him; for him it begins after he has, as it were, paid the royalty to himself. The royalty is assured to him whether he gets the contract or not, and hence does not enter into his margin of profit under the contract. In other words, it is not as patentee that he competes for the contract, but as contractor. As contractor, he pays the royalty to himself as patentee, if he secures the contract, precisely as the other con-

tractors would have to pay it if they secured the contract.

As we understand the testimony of the city engineer, the cost of laying a bitulithic pavement is something less than that of laying ordinary asphalt pavement, even including in the cost this 25 cents royalty; and we understand from the same testimony that the price of the present contract, \$2.80 per square yard, leaves a margin of profit amply sufficient for all purposes of competition after payment of this royalty.

We have considered whether the stipulation, as to inspectors for supervising the manufacture of the materials and the laying of them, did not practically amount to a reservation of authority to the patentee, by the exercise of which they might render the execution of the contract more burdensome or less burdensome at their whim and caprice, and whether this might not have the effect of deterring competition. But nothing of that kind is even hinted at; and, furthermore, the evidence shows that nothing of that kind would be possible, and it shows that the same kind of pavement is being laid in Shreveport, Donaldsonville, and Baton Rouge under competitive contracts without hitch, and to the perfect satisfaction of all.

A case from the Appellate Court of the state of Indiana, a court corresponding, we understand, with courts of appeal of this state (*Seibert v. City of Indianapolis*, 81 N. E. Rep. 99), is submitted to us, in which the same patented pavement was involved, together with an agreement by which the patentees relinquished to whoever would be the successful bidder the use of the pavement process, and bound themselves to furnish the cement at 90 cents per square yard. The difference between that case and this is that in the instant case the patentee does not furnish the materials, but relinquishes to the contractor the right to manufacture them. Whether that circumstance distinguishes the two cases it is needless to consider. The argument of the court in that case is that there would be no competition in the contract because the cements would have to be bought, not at a price fixed by competition on the open market, but at a price fixed by the patentee. The fallacy of this argument lies in the assumption, which it gratuitously makes, that the statute requires that there shall be competition in the purchase of the materials, whereas the statute only requires that there shall be competition in the award of the contract. There is competition in the award of a contract if the award is made after due advertisement and with a margin of profit the same for all. We repeat, if the patentee himself is a competitor for the contract, he must take into consideration that the margin of profit for him in the contract is the same as for his competitors, because it only begins where his royalty ceases; that so far as his royalty as patentee is concerned he gets that whether the contract falls to him or not, and hence such royalty cannot be an inducement to him to compete for the contract.

In a recent very able opinion, in the case of *Saunders v. Iowa City* (not yet officially reported) 111 N. W. Rep. 529, the Supreme Court of Iowa had discussed this question very elaborately, referring to all the cases. We think it would be pure waste of time to travel over the same grounds and rehash the same arguments.

Nothing contained in the present opinion is intended to militate in the slightest degree against the decision of this court in the case of *Burgess, Bennett, etc. v. City of Jefferson*, 21 La. Ann. 143, or the *dictum* in *Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 261, 5 So. Rep. 848, where no such agreement had been filed by the patentee as in this case.

Judgment affirmed.

NOTE.—*Validity of Contracts of Municipal Corporations for a Material or Process Protected by Patent where Law Requires Work to be Let to Lowest Bidder.*—The various jurisdictions are divided as to the validity of such a contract. In some jurisdictions a contract of this character is held to be void. In other words, that where the law requires a contract to be let to the lowest responsible bidder the municipality has no power to advertise for bids and let a contract where the specifications require the use of a patented process or article. The theory upon which these decisions rest is that if the article or process is protected by patent there can in the nature of things be no competition as the owner or owners of the patent are the only persons who can bid. In deciding such a case against the validity of the contract the Supreme Court of California says in *Nicholson Paving Co. v. Painter*, 35 Cal. 695: "The case shows that the Nicholson Pavement is an invention which has been patented under the laws of the United States, and that plaintiff alone owns and holds the right to put it down in the streets of San Francisco." It is likewise held by the Kentucky courts in *Fineran v. Central Bitulithic Paving Co.*, 116 Ky. 495, "that if the ordinance requires a letting to the lowest bidder, an ordinance requiring a street to be paved with a patented composition would be void."

Distinction as to Articles or Processes Protected by Patents and Articles where there is a Monopoly of the Natural Supply.—In *Fishborn v. City of Chicago*, 171 Ill. 338, the ordinance was declared void on the ground that specifications which provided for "Trinidad Asphalt" from Pitch Lake in the Island of Trinidad gave a monopoly to the owner of that lake, and prevented competition. In the course of the opinion the court remarks that the cases cited in support of the power of a municipality to provide by ordinance for some article controlled by one party were almost uniformly articles protected by patent and the court intimates that a monopoly based on a patent may stand in a different position from a monopoly of other character.

But, in Missouri contracts have been upheld even in cases where owner of the patent has a monopoly by reason of his exclusive ownership of the natural supply. See *Barber Asphalt Paving Co. v. Hunt*, 100 Mo. 22; *Verdin v. City of St. Louis*, 131 Mo. 26. In Michigan, Missouri, and New York, the doctrine seems well established that a contract will not be void where the process is patented and a single person has the right to use it, even though there be a requirement that the contract be let to the lowest bidder.

Effect of the Patentee Filing a Royalty Agreement.

—In the principal case it is held that where a patentee files with the proper authorities an agreement to permit the successful bidder to use his patent or process upon the payment of a stipulated royalty, that this agreement puts all bidders upon an equal footing. This agreement, as will be noted, is based on the fact that if the patentee does the work at a price which would be a loss, were it not for the royalty, he would of necessity be making less than in case he had allowed another bidder to do the work and pay him the specified royalty.

In agreement with this case, see *Kilvington v. City of Superior* (Supreme Court of Wisconsin), reported in 18 L. R. A. 45. In this case the contract was entered into after patentee had agreed to permit the successful bidder to use his patent process for a specified sum. In upholding the contract, the court says: "Under another theory a municipal corporation would be obliged to forego the purchase and use of all patented implements, modes or processes, a result which we cannot think the legislature contemplated."

Even the most casual examination of the authorities will show an irreconcilable conflict. It seems that the weight of authority now favors the doctrine that a municipal corporation may specify an article even though there be a monopoly by reason of patent processes, particularly where the patentee has agreed to permit the successful bidder to use his patents and processes upon the payment of a fixed royalty. After a contrary decision in the state of Wisconsin, the legislature passed a bill especially for the purpose of making valid such contracts. Reason would seem to favor this rule, for as is well said in the *Kilvington* case, *supra*, any other doctrine would shut out a municipal corporation from the benefits of modern invention and progress.

ANDREW C. KETRING.

St. Louis, Mo.

JETSAM AND FLOTSAM.

CURIOSITIES OF WILLS.

Perhaps the most stupendous collection of wills in the world is that located in the cellars of Somerset House, London, an ancient, gloomy palace fronting on the Strand and on the River Thames. This marvelous storehouse contains wills dating back for nearly a thousand years, and its galleries are haunted all day by eager, excited crowds, each individual in which has paid twenty-five cents to inspect a certain will. It is not surprising to hear that novelists and dramatists from all parts of the world come hither to consult the wills of historic personages, as well as the merely notorious in this vast collection. The well known writer Miss Braddon is a frequent visitor, as also is Sir A. Conan Doyle, Sir Gilbert Parker, and Anthony Hope.

Many among the general crowd have been attracted from the ends of the earth,—from Central Australia, South Africa, South America, and the South Sea Islands,—merely because some old scrap of newspaper has fallen into their hands bearing an announcement of the death of some person more or less remotely connected with them. This event arouses fervent expectations; hence the long journey half way round the world on the chance that at the end of

it one glance at some faded parchment may raise the searcher from poverty to affluence.

Even the will of Shakespeare himself may be seen at Somerset House, though it naturally is guarded most jealously, because the signature upon it is one of the five extant specimens of the poet's handwriting. And that scraggy autograph, if brought into the market to-morrow, even detached from the will, would sell for thirty thousand dollars.

Standing in these gloomy galleries, with their immense vistas of racks and pigeonholes, one feels permeated with the spirit of romance; he hears the dead whispers of statesmen and adventurers the world over. There is even a small museum of queer exhibits that have figured in the law courts in connection with famous will disputes. There is, for example, the leg of an old fashioned four-poster bedstead. The story told about this by the record keeper of the will department is as follows:

"The Earl of Stafford was a morose, reserved, and highly eccentric nobleman, who suspected everybody of sinister intent. For this reason he developed a mania for hiding things. Important deeds and letters, with bank bills for large sums, he would bundle into dark cellars and subterranean passages, with disastrous results to this property. He would even rip open chair cushions and secrete money and documents in the hair; and in short every hole and corner in his various town and country residences had its hidden treasure.

After his death the will and first codicil were readily forthcoming, because they were in much safer keeping than His Lordship's. The second and most important codicil, however, it took three years to find. After the Earl's death, the bed on which he slept, being an ugly, old fashioned piece of furniture, was promptly consigned to the lumber room; and it was only by the merest accident that a man servant at length discovered the long lost codicil, innocently tied to the cross bar of the bedstead leg.

This leg was produced in court, and to this day the string that held the document in position remains on the cross bar. The paper was found folded neatly, and resting on the ledge formed by the bar where it meets the bedpost. As Lord Safford lay in bed it was his delight to withdraw the will from its hiding place, and either dwell with satisfaction on its contents or make any slight alteration that pleased him at the moment. Now, as this missing codicil contained legacies and bequests to a very large amount, its dramatic production caused much excitement. And in order that the strange story might be demonstrated before the probate court, a complete model of the entire bedstead was made by order of the lawyers, on the scale of one inch to a foot. This model was added to the collection and is also preserved in the strong room at Somerset House."

Also in this immense collection is a will recovered from the sea. The testator was a laborer who died at Sunnyside, Canterbury, New Zealand, on June 11, 1868. The man left all he had—some fifteen hundred dollars, in the British Post Office Savings Bank—to his wife, who lived in the quaint old village of Rye, in Sussex. This will was rather an elaborate document, engrossed at great length on parchment, and bearing the seal of the Supreme Court of New Zealand in the bottom left hand corner. It was drawn by William H. Kissling of Auckland.

In due time Kissling sent the will to a brother attorney in London; but the vessel conveying it was dashed to pieces off Selly Islands near Cornwall, and

out on the face of the waters floated the fateful parchment with the drowning crew and scattered cargo. Ten months later a Cornish fisherman mending his nets on the beach near Penzance saw a packet washed ashore by a big roller. It was the New Zealand will; and after making inquiries as to the best course he ought to pursue, the fisherman sent on the packet to London, addressed casually to any lawyer practicing at the London bar.

By a remarkable coincidence it reached the very attorney Kissling had originally intended it for, and was delivered on May 18, 1875. On the envelope was written "Ex Schiller," the wrecked steamer. "This will," the attorney declared in his affidavit, "was sent with other documents by Mr. William Henry Kissling of Auckland, New Zealand, to enable me to take out letters of administration of the estate and effects in England belonging to the deceased. I declare that the said parchment writing, together with the letters and papers accompanying it, and the envelope from Mr. Kissling enclosing them, were perfectly wet and saturated, forming altogether a confused packet like pulp. It was only by using the greatest care that the said parchment writing was separated and stretched out as the same now appears."

One is delighted to find that the "secret cabinet" of the dime novel is here in all its massive reality, and treated in the most matter of fact way by a very prosaic set of officials. Here for instance is a massive brass bound box with a great number of sliding panels, and secret drawers within secret drawers, like a Chinese puzzle box. This is one of the old relics that came from Doctors' Commons, the ancient London repository for wills prior to their being deposited in the vaults of Somerset House.

This casket or chest belonged to an immensely wealthy physician who lived in London at the beginning of the eighteenth century. He had many relations, and as he advanced in years their attentions became intolerable. They all wished to know how the old man intended to dispose of his money and property. For this reason they wrangled with him, as well as among themselves, little dreaming that the old doctor had a plan of his own. He had in fact made his will quietly, and then had a special place of safe keeping made for it.

With his own hands he designed this secret cabinet, taking an almost childish delight in devising the many panels and drawers. And once he had deposited the will in this box, he never allowed it to go out of his keeping, not even when he went to bed at night. Asked by the curious as to its contents, he declared that it contained medicines of wondrous efficacy brought from far countries. Oddly enough, on the strength of the brass bound chest, his income increased to an immense figure; but all the same there came a time when the treasure chest fell into the eager hands of his relatives, when the will, after much baffling search, was found in one of the sliding panels. The document caused positive consternation; for a poor married niece, who was supposed to be out of the running altogether came in for nearly the whole of a fortune running well over four million.

The records of the law courts of the nations show that wills are often found in unexpected places, from weather cocks to picture frames; but there is surely only one instance of a will being found prosaically entered with other business matters in an office day-book. Such a volume is treasured carefully at Somerset House, because a will has been made in it, following other entries relating to goods and the sale of

cattle. It is a long, narrow book of the well known office kind, and on the outside is written, "Peter Smith, March, 1807.—Day Book for the Park." Smith was evidently an overseer or steward on some nobleman's estate. As the probate court authorities were concerned with only one folio, the remainder of the leaves are fastened together, so that the book immediately opens at the required place. The entry which is really the will has been marked "Exhibit A," and here we read, "Left due to my dear wife \$500." Just above is an entry debiting "Mr. Richard Hill" with "three beasts at \$77 each."

Instances of grim humor in wills are almost without number. They are seldom in the best of taste, perhaps, particularly when the jokes have reference to "my mode of burial." A case in point was that of a man who left personal estate worth fifty-two thousand two hundred dollars. "The coffin," he wrote, after disposing of this money, "is to be of red fir. I pine for nothing better; and even this may be thought a good deal too good, though certainly not very spruce."

In Somerset House one may see many ancient wills containing elaborate drawings and sketches, mainly illustrative of the trade or occupation of the testator. For example, the initial letter of a certain baker's will takes the form of a sheaf of golden corn. Indeed, most of the older wills were remarkable for curiosities. Thus, Izaak Walton's is sealed with a curious device showing the Savior crucified on an anchor. Others contain long sermons variegated with positive abuse.

"I leave," angrily writes a rich attorney, "to Herbert L—, his wife, and Francis Elizabeth my sister, the happy assurance that their greed, jealousy, folly, plots, schemes, and vile lies have succeeded in making life a burden to me." This reminds one of the will of a Boston man, by which his wife was left penniless unless she married again within five years. The reason for this unusual proviso was that he wanted somebody else to find out how hard it was to live with her.

A very curious case is that of a will which came from Egypt during plague time, preserved in a bottle of spirit for fear of infection. The testator was apothecary to the British naval forces in Abukir Bay, and as he was stricken with the deadly sickness he made out his will and sent it in the form of a letter to the surgeon on the flagship. It began in this unpromising fashion:

ABUKIR, July 1, 1801.

MY DEAR —

Being now Afflicted with the Plague, the Scourge of Mankind, which will probably soon terminate my existence—"

But when he received this queer will letter the surgeon grew scared. Fearing that the paper was infected with the deadly disease, he did not put it with the rest of his documents, but instantly made a copy of it, compared this with the original, and then placed the latter in a bottle of spirit and brought it carefully home to England. Unfortunately, when that bottle was opened, no trace of writing remained on the paper, the ink having been entirely absorbed by the strong spirit. Then it was that the surgeon executor produced his copy and proved the will.

Of riming wills there is in existence that of S. J. Powell, whose impartiality and correct moral tone renders his will an excellent specimen. It runs as follows:

When my wife's a widow of me bereft,
She shall inherit all I've left;
And when she's finished her career,

It shall then go to my Daughters dear.
In equal shares to save all bother,
Not flesh to one and fish the other;
They are all kind and dear to me,
So no distinction shall there be.

Among the historic wills, perhaps the most interesting was one of Lord Nelson's, which appears to have entirely escaped notice. Yet this too may be found in the probate registry at Somerset House in the form of a little pocketbook belonging to the famous British Admiral. In this peculiar document the hero bequeaths the lovely Lady Hamilton to his King and country, and tells in magniloquent language how her moral support helped him to win certain famous victories which have made history. He also complains about some letters the famous beauty stole from him. Most interesting of all, perhaps, the will is dated "In sight of the 'Allied Fleets.'"

There is a record of at least one will in shorthand. The document lies in a glass case set in a box made to resemble a bound book, so that the moment the cover is lifted a cabalistic scrawl is beheld. On the outside is the name "H. Worthington; February, 1815." This is the Rev. Hugh Worthington, formerly of Islington, one of the northern suburbs of London. The other side of the little book box also opens, and contains a letter addressed to "my dear Eliza Price, who is my adopted child." It is evident that the reverend man was a fanatical stenographer, because he says, "I do know you will perfect yourself in shorthand for my sake." It would take a long time to relate the vicissitudes experienced by this novel shorthand will; for all kinds of queer accidents appear to happen to these fateful documents. They get burnt or thrown into water, torn up, eaten by rats, carried away by birds, and so on.

One will is preserved in cotton wool in a big legal looking box, and the investigator was told that on being touched the document would crumble to pieces. It is the will of a very rich wholesale baker, and in some strange way it got into a huge oven, where it remained for months. The original is never disturbed, for a certified copy is kept for reference.

Among the freak wills was one by which the trustees were directed to pay the widow every year her own weight in gold. The weighing was to take place more or less in public; and the woman usually received about eleven hundred and sixty-one ounces, troy, of the precious metal which at twenty dollars an ounce worked out a very handsome income. Somewhat similarly, a Scotchman bequeathed to his two daughters their weight in one pound bank notes. The elder got two hundred and fifty-six thousand dollars, and the younger two hundred and eighty-six thousand seven hundred twenty dollars.

Instances of bitterness and malevolence are by no means infrequent. "I hereby direct my executors," wrote a wealthy farmer, "to lay out twenty-five dollars in purchasing a picture of a rattlesnake biting the benevolent hand of the person who saved him from perishing. And I direct that in memory of me they present the same to J—G—B, so that he may have frequent opportunities of contemplating it and forming a certain judgment as to which is best and most profitable—a grateful remembrance of past friendship and all but parental regard, or dire ingratitude and insolence. This I direct to be presented to him in lieu of a legacy of fifteen thousand dollars, which I had by a former will, now revoked and burnt, left him."

Vaugelas, the famous French grammarian, although in receipt of several pensions, was habitually in want of

money, so prodigal was he in his charities. Indeed, his intimates at length bestowed upon him the nickname of "The Owl," because it was unpleasant for him to come forth in daylight, so clamorous were his creditors. In his will he first disposes of the few dollars he possessed, and adds, "Still, as it may be found that even after this sale of my library and effects these funds will not suffice to pay my debts, the only means I can think of to meet them is that my body should be sold to the surgeons on the best terms that can be obtained and the sum resulting applied in so far as it will go toward the liquidation of any remaining sums which I still owe. I have been of very little use to society while I lived, and should be glad if in this way I am of service after death."

Dr. Dunlop, a man of Scottish origin, and at one time a senator of the United States, clearly held teetotalers in contempt, because he inserted the following paragraph in his will: "I leave my silver tankard to the eldest son of John, as the representative of the family. I would have left it to old John himself, but he would have melted it down to make temperance medals, and that would have been a sacrilege."

It is peculiar to note how strong prejudices or personal fears are expressed in wills. Not long ago an eccentric Parisian died, and left a rambling document in which he characterized the French as a "nation of dastards and fools." For that reason he bequeathed the whole of his large fortune, made entirely in ribbons in the town of St. Etienne, to the poor of London, and directed that his body be thrown into the sea exactly one mile off the British coast. Another Frenchman, but of much more jovial type, directed that a new cooking receipt should be pasted on his tombstone every day. As to fears, it is a common thing to leave a proviso in a will calling for the services of surgeons in order to make absolutely certain of death. The will of John Blount Price is a case in point. Here the testator directed that four skilled physicians should be paid twenty-five dollars each to perform such operations on his body as would surely kill him in the event of his remaining alive in a trance or other condition of suspended animation.

A Vienna millionaire had such a horror of darkness during his lifetime that he provided not only that the vault in which his body should rest was to be lighted by electric arcs, but also that the casket itself should be illuminated by small incandescent bulbs.

In many a man and woman's last will and testament there are curiously precise and eccentric directions about the disposal of the remains. Recently a Philadelphia man named Chambers directed in his will that his body was not only to be cremated, but his ashes taken by a committee of friends named in the document to the Bartholdi statue of liberty in New York harbor and there "flung to the four winds of Heaven," which ceremony was to be performed within two months of his death.

Women, for some reason, do not appear to look favorably upon cremation. In 1900 Mrs. Henry Davenport, an Englishwoman who lived a great deal in St. Louis, died, leaving behind a will in which she stated that her body was to find a resting place in the living room of her nephew John Roberts during his lifetime. On his death the gruesome relic was to be handed over to his heir, after which it was to be passed on to the next nearest relative, and similarly on "throughout all ages."

This fearsome request, however, was gilded by an income of five thousand dollars a year, clearly specified as left "for any little inconvenience which such a

request might entail." Mrs. Davenport did not stipulate in what way the body was to be kept, and the ingenious John Roberts had the body of his rich aunt cremated and her ashes inclosed in a neat urn, after which he built a small steel safe in his parlor wall, and there placed the remains. Each year, to this day, the terra cotta urn is brought forth from its retreat, placed on a flower decked altar, and a short service held to commemorate the good deeds of the eccentric woman, whose income the family is now enjoying. This will, however, all but led to protracted litigation.

There is no more profitable class of business for the lawyer than that arising out of disputes over wills. Only recently Judge O'Gorman of New York decided upon the six hundred thousand dollar will of Joseph Liebmann, a rich brewer, and substituted the word "her" for "my." Upon this seemingly slight decision hung the whole of this large fortune, which was taken from the son Henry L. Liebmann and distributed among the children of his four sisters.

The will of a French advocate, which is in the record office in Paris, expresses pithily his opinion of his own clients: "I give ten thousand francs," he wrote sarcastically, "to the local madhouse. I got this money out of those who pass their lives in litigation, and in bequeathing it for the use of lunatics I merely make restitution."—ALFRED F. HEIDE in the St. Louis Republic Sunday Magazine.

HUMOR OF THE LAW.

"Maud says she loves to see other people made happy."

"Now I understand why she goes to every trial for divorce in town."

"Doctor," asks the young man with the high collar and undercut chin and the egg-boiled eyes and the cigarette drooping from his lips and the narrow waist and reinforced shoulders, and the—and all the rest of the make-up—"Doctor, do you think I might be subject to brainstorm?"

"What!" said the doctor, glancing swiftly over the young man. "Brainstorms? If anybody tries to sell you a mental mackintosh or an intellectual umbrella, don't invest. You couldn't even get up a gentle breeze."

A Nashville lawyer once had a client noted for his unscrupulous business methods. The client lived in a small town, and bought and sold country produce. If the price of potatoes went up after he had contracted to purchase the crop, he would refuse to take them at the market price. If the price went down, however, he was surer than death or taxes to claim them at the prevailing market figure. Naturally, this policy got him into frequent and bitter litigation.

On one occasion he had become involved in a case based on a deal in potatoes. The man who owned the potatoes brought suit and the case was taken before a local justice. The lawyer conducted the defense along purely technical lines and the case was taken under advisement by the justice.

The client was called away on business in Chattanooga before the justice had rendered his decision, so when the latter brought in a verdict adverse to the plaintiff, the lawyer, in his somewhat unexpected triumph, wired his client:

Justice has triumphed.

Immediately came back the startled reply:

Take an appeal!

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1. ACCORD AND SATISFACTION—Consideration.—A payment by a debtor of a sum less than is due under his contract to the creditor held not a satisfaction of the debt.—Schlessinger v. Schlessinger, Colo., 88 Pac. Rep. 970.

2. APPEAL AND ERROR—Bill of Exceptions.—Where a copy of a deposition contained in a bill of exceptions was admitted in evidence, held, in view of the objection made to the admission of the copy the judgment ought not to be reversed merely because sworn testimony was not given regarding the loss of the original.—Miller v. Town of Canton, Mo., 100 S. W. Rep. 871.

3. APPEAL AND ERROR—Conclusions of Law.—Failure to make proper conclusions of law in an action for damages for breach of a contract in which the judgment was supported by the evidence is not cause for reversal.—Olsen v. Goerig, Wash., 88 Pac. Rep. 1017.

4. APPEAL AND ERROR—Construction of Former Judgment.—A former judgment, though the law of the case, being ambiguous, will not be interrupted so as to do manifest injustice.—Hasell v. Buckley, 103 N. Y. Supp. 377.

5. APPEAL AND ERROR—Exceptions to Instructions.—A general exception to a series of instructions by number severally and to each and every one of such instructions is sufficiently specific to present to the court for review the correctness of each instruction mentioned in the exceptions.—Snyder v. Stribling, Okla., 89 Pac. Rep. 222.

6. APPEAL AND ERROR—Review and Scope of Record.—On appeal the court will not consider an affidavit of appellant's attorney inserted in his brief where such affidavit does not appear to have been filed with the lower court.—Lakin v. Lawrence, Mass., 80 N. E. Rep. 578.

7. APPEAL AND ERROR—Stenographer's Report.—The stenographic report of the evidence in a case, not being a part of the record, cannot be considered as presenting questions of law on an appeal.—Hicks v. Graves, Mass., 80 N. E. Rep. 590.

8. APPEAL AND ERROR—Technical Issues.—Current appellate practice held to construe liberally matters presented for adjudication and to incline to finally determine merits of controversy rather than reverse on

formal or technical issues.—*Gordan & Ferguson v. Doran*, Minn., 111 N. W. Rep. 272.

9. **APPEAL AND ERROR—Time for Proceedings.**—The supreme court cannot extend the time for taking an appeal by permitting a vital amendment to the assignment of errors after the year allowed for taking the appeal.—*Brown v. Brown, Ind.*, 90 N. E. Rep. 535.

10. **ASSIGNMENTS—Notice of.**—Where two assignments of a chose in action are made to different persons, the assignee who first gives notice of his claim to the debtor has the prior right.—*Jack v. National Bank of Wichita, Okla.*, 89 Pac. Rep. 219.

11. **ASSIGNMENT FOR BENEFIT OF CREDITORS—Time Limit.**—A refusal of trustees under an assignment for the benefit of creditors to permit certain creditors to join therein after the expiration of the time fixed, unless they paid certain expenses incident to bankruptcy litigation instituted by them, held not an abuse of discretion.—*Moulton v. Bartlett, Mass.*, 80 N. E. Rep. 619.

12. **ATTACHMENT—Claims of Third Persons.**—Where a third person showed that he acquired title to property attached as that of a debtor, the burden held to be upon the attaching creditors to show that he had divested himself of that title.—*Lipschitz v. Halperin*, 103 N. Y. Supp. 202.

13. **ATTACHMENT—Costs.**—In a common-law action for wrongful attachment, plaintiff can only recover his statutory costs, and is not entitled to recover for attorney's fees in the action.—*McGill v. W. P. Fuller & Co.*, Wash., 88 Pac. Rep. 1038.

14. **ATTACHMENT—Ownership.**—Where a third person showed that he acquired title to property attached as that of a debtor, the burden held to be upon the attaching creditors to show that he had divested himself of that title.—*Lipschitz v. Halperin*, 103 N. Y. Supp. 202.

15. **ATTORNEY AND CLIENT—Skill and Care Required of Attorney.**—In an action for legal services, the court properly instructed the jury that the attorney was liable to his client for failure to exercise ordinary skill, care, and diligence, and they might consider this liability in determining the value of the services rendered.—*Morehead's Trustee v. Anderson, Ky.*, 100 S. W. Rep. 340.

16. **BANKRUPTCY—Allowance of Claims.**—On bankruptcy of administrator taking mortgage from claimants to secure himself against mispayment, claim of mortgagors for money paid them by administrator and subsequently recovered from them by persons entitled there to, held properly disallowed.—*In re Myer, N. M.*, 89 Pac. Rep. 246.

17. **BANKRUPTCY—Discharge.**—An obligation held not discharged by the debtor's subsequent discharge in bankruptcy.—*Schlessinger v. Schlessinger, Colo.*, 88 Pac. Rep. 970.

18. **BANKRUPTCY—Fraudulent Conveyance.**—The right to sue for property conveyed in fraud of creditors is vested alone in the trustee, and his failure to sue within the prescribed time does not transfer the right to a creditor.—*Ruhl-Koblegard Co. v. Gillespie, W. Va.*, 56 S. E. Rep. 898.

19. **BANKRUPTCY—Sale by Trustee.**—Where premises were sold by a trustee in bankruptcy, failure to file with the register of the county a certified copy of the adjudication in bankruptcy, as provided by bankruptcy law does not affect the validity of the title of the purchaser.—*Kennedy v. Holl*, 103 N. Y. Supp. 231.

20. **BANKS AND BANKING—Priority of Claims After Failure.**—One who deposits checks and drafts in bank in failing condition held not entitled to preference on failure of bank without tracing proceeds of the checks and drafts showing that they are included in the cash on hand.—*Cherry v. Territory, Okla.*, 89 Pac. Rep. 190.

21. **BENEFIT SOCIETIES—Time to Sde.**—An agreement in a contract of insurance with a beneficial association, that no action shall be maintained on the contract unless brought within one year after the death of the insured is not void as against public policy.—*Dolan v. Royal Neighbors of America, Mo.*, 100 S. W. Rep. 498.

22. **BILLS AND NOTES—Payment.**—Payment of a note given for a part of the purchase price of a piano held a *pro tanto* discharge of the debt as against holders of another fraudulent note representing the same indebtedness.—*Wickham v. Evans, Iowa*, 110 N. W. Rep. 1046.

23. **BILLS AND NOTES—Renewal Notes.**—A renewal note in which is included two notes upon which an indorser is liable does not conclusively extend the time of payment so as to discharge such indorser.—*Miners' & Merchants' Bank v. Rogers, Mo.*, 100 S. W. Rep. 534.

24. **BROKERS—Commissions.**—A broker employed to sell real estate is not entitled to a commission unless he procures a purchaser ready, able, and willing to take the same on the terms given to the broker by the owner.—*Wagner v. Norris, Colo.*, 88 Pac. Rep. 974.

25. **BROKERS—Liability for Excess of Price Obtained.**—A real estate broker employed to sell a farm at a specified sum per acre held bound to account to the owner for a sum received in excess of the specified sum.—*Borst v. Lynch, Iowa*, 110 N. W. Rep. 1031.

26. **CARRIERS—Knowledge of Defects.**—Railway company held liable for injuries from defects of which it had actual knowledge, or which had existed so long that notice might be reasonably inferred.—*Atchison, T. & S. F. Ry. Co. v. Allen, Kan.*, 88 Pac. Rep. 966.

27. **CARRIERS—Notice as to Feeble Condition of Passenger.**—Notice to a porter on a train, acting also as brakeman, of the weak condition of a passenger, was notice to the railway, obligating it to exercise such care as would reasonably insure the safety of the passenger under the conditions.—*Gulf, C. & S. F. Ry. Co. v. Redeker, Tex.*, 100 S. W. Rep. 862.

28. **CHAMPERTY AND MAINTENANCE—Purchases of Shares of Distributees.**—A contract made pending an action by distributees of an estate against an administrator and the surety company executing his administration bond, whereby the attorney of the company purchased from certain of the plaintiff distributees their shares in the estate held valid.—*Moseley v. Johnson, N. Car.*, 56 S. E. Rep. 922.

29. **CHATTEL MORTGAGES—Consideration.**—A pre-existing liability as surety constitutes a valid consideration for a mortgage indemnifying the surety against such, and this, notwithstanding the surety may already have a mortgage for his protection.—*Kitchen v. Schuster, N. M.*, 89 Pac. Rep. 231.

30. **CONSTITUTIONAL LAW—Amendment of State Constitutions.**—Where there is a substantial compliance with the requirement of Const. art. 17, § 1, as to publication of a proposed amendment, the fact that the publication was made for one week less than the required time in one county of the state held not to invalidate the amendment.—*State v. Winnett, Neb.*, 110 N. W. Rep. 1118.

31. **CONSTITUTIONAL LAW—Employer's Liability Act.**—Employer's liability act (Burns' Ann. St. § 7098, subd. 2), in so far as applicable to corporations other than railroad corporations, held violative of the fourteenth amendment of the federal constitution.—*Bedford Quarries Co. v. Bough, Ind.*, 80 N. E. Rep. 529.

32. **CONSTITUTIONAL LAW—Right to Acquire Property.**—Code Civ. Proc. § 1195, in relation to attorney's fees in mechanic's lien cases, held violative of the state constitution, declaring the unalienable rights of possessing and protecting property.—*Builders' Supply Depot v. O'Connor, Cal.*, 88 Pac. Rep. 982.

33. **CONTRACTS—Consideration.**—The promise of an architect to pay the agent of a trust company a commission if he would procure a loan from the company to the architect's employer, so as to enable him to build, was not void as against public policy.—*McCrary v. Thompson, Mo.*, 100 S. W. Rep. 535.

34. **CORPORATIONS—Ratification of Contract.**—Failure to promptly disaffirm a contract by a majority of a board of directors, who have knowledge of the same, is a ratification by the corporation.—*Brown v. Crown Gold Milling Co., Cal.*, 89 Pac. Rep. 86.

35. CORPORATIONS—Waiver of Tort.—Where a corporation accepts money, notes, and other securities in satisfaction of a tort committed by its officers, which it had treated as a debt, all others liable on the tort are thereby released.—*Security Warehousing Co. v. American Exch. Nat. Bank*, 103 N. Y. Supp. 399.

36. COUNTIES—Effect of Segregation of Territory on Tax Levy.—Where, after judgments had been rendered against a county, certain of its territory was detached and added to other counties, the original county had power to compel contribution from the counties to which the territory had been added in the manner provided by Laws 1903, p. 30, ch. 20.—*Territory v. Board of Comrs. of Santa Fe County, N. M.*, 89 Pac. Rep. 252.

37. COUNTIES—Injunction Against County Commissioners.—A taxpayer and citizen of a county held entitled to maintain a suit to restrain the board of commissioners from illegally proceeding with the construction of a court house.—*Macy v. Board of Comrs. of Miami County, Ind.*, 80 N. E. Rep. 553.

38. COURTS—Road Tax.—Where, in a proceeding for refusal to pay a road tax in violation of a city ordinance, defendant claims that he is exempt, the question is one of fact, and no appeal lies to the supreme court.—*Town of Minden v. Crichton, La.*, 43 So. Rep. 395.

39. COVENANTS—Action for Breach.—A defense to an action on a covenant of warranty that plaintiff, knowing the title, agreed to accept it and obtained a warranty deed by fraud, cannot be sustained.—*Menasha Wooden Ware Co. v. Nelson, Wash.*, 88 Pac. Rep. 1018.

40. CRIMINAL EVIDENCE—Rape.—In a prosecution for rape held no error to refuse to permit the jury during the trial to privately examine the private parts of accused.—*State v. Stevens, Iowa*, 110 N. W. Rep. 1037.

41. CRIMINAL TRIAL—Argument of Prosecuting Attorney.—The prosecuting attorney in a criminal case may present to the jury his view of the deductions drawn from the evidence, and though his reasoning is faulty, and his deductions illogical, no exception lies to his argument.—*People v. Willard, Cal.*, 89 Pac. Rep. 124.

42. CRIMINAL TRIAL—Kv. dence as to Flight When Accused of Crime.—A defendant, except under peculiar circumstances, cannot be permitted to show that he did not become a fugitive from justice when accused or suspected of the crime.—*People v. Curtiss*, 103 N. Y. Supp. 395.

43. CRIMINAL TRIAL—Expert Testimony.—A question propounded to a nonexpert calling for his opinion as to accused's sanity, based in part on what the witness had observed in others committed to him for incarceration because of insanity, held erroneous.—*Duthey v. State, Wis.*, 111 N. W. Rep. 222.

44. CRIMINAL TRIAL—Incompetency of Juror.—To justify the court in sustaining a motion for a new trial in a criminal case on the ground of the incompetency of a juror, ignorance of the incompetency at the time accused made his challenges held essential.—*State v. Mathews, Mo.*, 100 S. W. Rep. 420.

45. CRIMINAL TRIAL—Manslaughter.—An honest belief entertained by accused that deceased was about to inflict some great personal injury on him without any reasonable grounds therefor held insufficient to reduce the grade of crime from murder in the first or second degree to manslaughter.—*State v. Clay, Mo.*, 100 S. W. Rep. 439.

46. CRIMINAL TRIAL—Murder in Second Degree.—In prosecution for homicide, instruction on murder in the second degree held not erroneous because defining the word "deliberately" in connection therewith.—*State v. West, Mo.*, 100 S. W. Rep. 478.

47. CRIMINAL TRIAL—Peremptory Challenges.—Where accused did not claim his right to 20 peremptory challenges until after the jury had been sworn a second time after one of the jurors had been excused, his right thereto was waived.—*State v. Yandell, Mo.*, 100 S. W. Rep. 466.

48. DAMAGES—Failure of Undertaker to Properly Inter Body.—The parents of a deceased child may join in an

action to recover damages for breach of a contract for proper burial.—*Wright v. Beardsley, Wash.*, 89 Pac. Rep. 172.

49. DAMAGES—Right to Lateral Support.—Where plaintiff's building was deprived of lateral support by defendant's negligence in digging a trench near the party wall, the fact that the source of the injury was the settling of the wall did not affect the measure of damages.—*Hopkins v. American Pneumatic Service Co., Mass.*, 80 N. E. Rep. 624.

50. DEEDS—Restrictions.—The maintenance of an automobile garage held, under the evidence, to have been obnoxious to a restriction in a deed against the carrying on of a business offensive to a residential neighborhood.—*Evans v. Foss, Mass.*, 80 N. E. Rep. 557.

51. DIVORCE—Cruelty.—The scramble of the wife for the possession of her child, which brought on an assault against the husband by her brothers, was not such an act of cruelty toward the husband as to be ground for a divorce.—*Galigher v. Galigher, Oreg.*, 89 Pac. Rep. 146.

52. EASEMENTS—Permissive Use.—The continuous use of a way over an owner's land as a matter of right for 15 years held to create a presumption of grant, leaving on the owner seeking to close it the burden of proving that the use was permissive.—*Bryars v. Rash, Ky.*, 100 S. W. Rep. 806.

53. ELECTIONS—Right to Vote at Primaries.—Persons who had already voted at a regular democratic or republican village caucus were disqualified to vote at another village caucus held by a different political party.—*In re Freund*, 103 N. Y. Supp. 420.

54. EMINENT DOMAIN—Vacation of Street.—The purchaser of a lot calling to bind on the street is entitled to a right of way over the street only until it reaches some other street, and the city may vacate the same beyond these points without infringing on her private easement.—*Reis v. City of New York, N. Y.*, 80 N. E. Rep. 578.

55. EMINENT DOMAIN—Water Courses.—A natural water course or artificial drainage channel, existing on lands when condemnation proceedings are commenced, cannot, after the land has been taken, be closed to the injury of the party who owns the remainder of the tract.—*Reed v. Board of Park Comrs. of City of Winona, Minn.*, 110 N. W. Rep. 1119.

56. EQUITY—Mistake as to Date of Judgment.—Where a bill in equity states a judgment as of one date, and the copy of the judgment exhibited with the bill gives the judgment as of another date, the mistake is immaterial, and the court should be governed by the date in the copy.—*Richardson v. Ebert, W. Va.*, 56 S. E. Rep. 887.

57. ESTOPPEL—Clothing Another with Apparent Title to Personalty.—An owner of personal property investing another with the apparent ownership is estopped to claim title to the property after the party in possession has secured advances from a third person, who believes the title to be in the apparent owner.—*Kempner v. Thompson, Tex.*, 100 S. W. Rep. 351.

58. EVIDENCE—Letter of Person Since Deceased.—A letter from a person deceased before the commencement of an action tending to contradict material testimony of one of the plaintiffs was competent, though it contained some irrelevant matter.—*Randall v. Clafin, Mass.*, 80 N. E. Rep. 594.

59. EVIDENCE—Minutes of Justice.—Minutes of a justice of the peace of defendant's testimony on the trial of an action before him in which defendant was both party and a witness, held inadmissible into subsequent disposition proceedings against him.—*Watkins v. Clough*, 103 N. Y. Supp. 270.

60. EXECUTION—Sale Under Execution.—If a sheriff issues certificate of sale under execution before the bid has been paid in cash, the sale is valid, and the remedy of the execution debtor is an action against the sheriff.—*Carlson v. Headline, Minn.*, 111 N. W. Rep. 259.

61. EXECUTORS AND ADMINISTRATORS—Action by Distributees.—In an action by distributees of an estate

against the administrator for an account and settlement, plaintiffs held not compelled to take the sale of certain bonds and stocks by the administrator at the time he made it as conclusive evidence of value, but were entitled to prove the market quotations of value at different times.—*Moseley v. Johnson*, N. Car., 56 S. E. Rep. 922.

62. EXECUTORS AND ADMINISTRATORS.—Contracts of Deceased.—An administrator and heirs of the vendee of certain standing timber, having elected to continue the contract after the vendee's death, held bound to perform a condition requiring the vendee to pay taxes assessed on the land during performance of the contract.—*Michigan Iron & Land Co. v. Nester*, Mich., 111 N. W. Rep. 177.

63. EXECUTORS AND ADMINISTRATORS.—Jurisdiction to Compel Accounting.—The supreme and surrogate's courts have concurrent jurisdiction to compel executors and trustees to account, but the supreme court will ordinarily exercise its jurisdiction only in special cases where the surrogate's court has not full jurisdiction.—*Bushe v. Wright*, 103 N. Y. Supp. 410.

64. EXECUTORS AND ADMINISTRATORS.—Necessity of Administration.—Where one of the heirs of an estate is a resident of Texas, and several are minors, it is proper to place the succession under administration.—*Succession of Trahan*, La., 43 So. Rep. 406.

65. EXECUTORS AND ADMINISTRATORS.—Purchase by Executor at His Own Sale.—An executor or administrator has no power to purchase property at his own sale, either directly or indirectly by an agent, but the purchase in such case is voidable, and not void.—*Brinkerhoff v. Brinkerhoff*, Ill., 80 N. E. Rep. 1056.

66. FALSE PRETENSES.—Sufficiency of Information.—An information for obtaining goods by false pretenses by inducing the prosecutor to exchange his goods for land by the use of a fraudulent abstract of title held to sufficiently allege that the deed for the land was delivered to and received by the prosecutor in exchange for his goods.—*State v. Roberts*, Mo., 100 S. W. Rep. 434.

67. FIRE INSURANCE.—Retention of Premium as a Waiver.—The mere retention by an insurer of the premium for a fire policy held not a waiver of the defense that the same is void for misrepresentations made by the insured as to his title to the realty.—*Goorberg v. Western Assur. Co.*, Cal., 89 Pac. Rep. 130.

68. FIRE INSURANCE.—Total Loss Under Standard Policy.—After a loss under a standard form policy, the insured may sue as for a total loss, and allege in addition thereto the actual amount of the damage and recover for the actual damages as proved.—*Moore v. Sun Ins. Office*, Minn., 111 N. W. Rep. 260.

69. FRAUDS, STATUTE OF.—Debt of Another.—Defendant's promise to pay a contractor's debt to plaintiff, in consideration of plaintiff's refraining from filing a lien and furnishing additional materials, held not within the statute of frauds.—*Schnauffer v. Ahr*, 103 N. Y. Supp. 195.

70. FRAUDS, STATUTE OF.—Liens.—Defendant's promise to pay a contractor's debt to plaintiff, in consideration of plaintiff's refraining from filing a lien and furnishing additional materials, held not within the statute of frauds.—*Schnauffer v. Ahr*, 103 N. Y. Supp. 195.

71. FRAUDS, STATUTE OF.—Signature of One Party Only.—A memorandum of an offer to sell seed, subscribed by the seller only, is sufficient to satisfy the statute of frauds as to the party subscribing it and against whom the action is brought.—*Bailey v. Leishman*, Utah, 89 Pac. Rep. 78.

72. FRAUDULENT CONVEYANCES.—Evidence.—Where the evidence shows that a transfer by a debtor was made when the grantor's debt was only a small amount compared with the value of his property, and was secured by a mortgage, the *bona fides* of the transaction is established.—*Seeley v. Ritchey*, Neb., 110 N. W. Rep. 1005.

73. FRAUDULENT CONVEYANCES.—Husband and Wife.—Where a conveyance by a husband to his wife was in consideration of a *bona fide* indebtedness, equal to the then supposed value of the land, it was immaterial to the validity of such conveyance that the prop-

erty subsequently increased in value.—*Ilfeld v. DeBaca*, N. Mex., 89 Pac. Rep. 244.

74. FRAUDULENT CONVEYANCES.—Instructions.—The refusal to give an instruction submitting to the jury the issue of the existence of a fraudulent scheme to defraud the creditors of a husband held erroneous.—*Fink v. McCue*, Mo., 100 S. W. Rep. 549.

75. GARNISHMENT.—Previous Payment.—Where, before the service of a garnishee summons, the garnishee had delivered to the principal defendant a nonnegotiable draft, which was accepted and transferred to a bank for value, the garnishee was not liable.—*Patek v. Chicago & N. W. Ry. Co.*, Mich., 110 N. W. Rep. 1039.

76. INFANTS.—Partition.—Infants not being parties to a partition suit, their rights cannot be adjudicated therein, and a decree entered is void as to them.—*Oneal v. Stimson*, W. Va., 56 S. E. Rep. 889.

77. INJUNCTION.—Subjects of Relief.—A mortgagee held not entitled to an injunction to restrain the purchaser of the mortgaged property from violating a contract between the parties to the mortgage to secure which contract the mortgage was given.—*Hardy v. Allegan Circuit Judge*, Mich., 111 N. W. Rep. 166.

78. JUDGMENT.—Joint and Several Judgment.—A judgment cannot be recovered against defendants jointly where their liability and the measure of recovery is expressly stated in the declaration to be proportional to their respective interests in certain land.—*Foot v. Cotting*, Mass., 80 N. E. Rep. 600.

79. JUDGMENT.—Motion in Arrest.—After verdict for plaintiff, the court will regard that every material fact upon a motion in arrest of judgment alleged in the declaration or fairly or reasonably inferable from what is alleged was proved on the trial.—*Chicago City Ry. Co. v. Shreve*, Ill., 80 N. E. Rep. 1049.

80. JUDICIAL SALES.—Failure to Comply With Bid.—Where a motion to compel a purchaser of land at judicial sale to complete his purchase is resisted on the ground that the title is not marketable, held the court may allow the production of further affidavits to show the true facts.—*Wanser v. De Nyse*, N. Y., 80 N. E. Rep. 1088.

81. JURY.—Opinions Before Trial.—A juror, though having an opinion derived from public rumor as to the facts, held competent, where he unequivocally stated that he could and would lay aside such opinion and try defendant fairly on the evidence introduced.—*Territory v. Emilio*, N. Mex., 89 Pac. Rep. 239.

82. LANDLORD AND TENANT.—Covenants.—Where a covenant for quiet enjoyment in a lease was broken by the lessor's refusal to permit the lessee to occupy the premises except on an unwarranted condition, the lessee was entitled to maintain suit for damages.—*Garrison v. Hutton*, 310 N. Y. Supp. 265.

84. LANDLORD AND TENANT.—Dangerous Premises.—Where a landlord retained an elevator in a building for the benefit of all his tenants, and permitted the gates to remain out of repair, so that plaintiff was injured while delivering ice to a tenant, the landlord was negligent.—*Hamilton v. Taylor*, Mass., 80 N. E. Rep. 592.

85. LANDLORD AND TENANT.—Right to Monthly Rental.—Lessor's right to recover a monthly rental held destroyed by notice to lessee that his lease was null and void, which notice was followed by eviction.—*Sutton v. Goodman*, Mass., 80 N. E. Rep. 608.

86. LIBEL AND SLANDER.—Excessive Damages.—In an action for slanderous remarks concerning a woman, the fact that she is a woman extremely common if not coarse is an insufficient reason why a recovery of \$500 is excessive.—*Flannigan v. Strauss*, Wis., 111 N. W. Rep. 216.

87. LOGS AND LOGGING.—Sale of Timber.—A contract for the sale of timber held to convey only so much of the timber standing on the land as should be cut within a specified period.—*Michigan Iron & Land Co. v. Nester*, Mich., 111 N. W. Rep. 177.

88. MANDAMUS.—Compelling Canvass of Votes at Election.—The board of canvassers of a county adjoining

without completing its work may be compelled by mandamus to reconvene to make a canvass of the returns.—*Lehman v. Pettingell*, Colo., 89 Pac. Rep. 48.

89. MASTER AND SERVANT—Defective Appliances.—Where a servant was injured by a defective chain selected by a fellow servant held that the master was not excused, though there were other chains furnished by it which were suitable; the fellow servant having used proper care.—*Cushing v. G. W. & F. Smith Iron Co.*, Mass., 80 N. E. Rep. 596.

90. MASTER AND SERVANT—Duty to Instruct as to Machinery.—An employer held not required to see that safe appliances furnished for his employees are properly used on his adopting reasonable regulations for their use.—*Jurkiewicz v. American Car & Foundry Co.*, Mich., 111 N. W. Rep. 183.

91. MASTER AND SERVANT—Injury to Minor Servant.—A petition by parents suing for death of child caused by defendant furnishing him a wild and vicious team to work with, need not allege that defendant knew the team was wild and vicious.—*Bellamy v. Whitsell*, Mo., 100 S. W. Rep. 514.

92. MASTER AND SERVANT—What Law Governs as to Injuries.—Where a servant was injured in operating a railroad in Nevada, whether he was barred from recovery by the fellow servant rule depended on the law of that state.—*Morrison v. San Pedro, L. A. & S. L. R. Co.*, Utah, 89 Pac. Rep. 393.

93. MECHANICS' LIENS—Costs.—The statute providing for an allowance to successful claimants in mechanics' lien cases of the expense of filing their liens is not unconstitutional.—*Builders' Supply Depot v. O'Connor*, Cal., 88 Pac. Rep. 982.

94. MORTGAGES—Attorney's Fees.—Where a mortgage provided that on default on any one of a series of notes the remainder shall become due, and the mortgagor defaulted on an interest note, the principal became due at once, and plaintiff on foreclosure became entitled to the stipulated attorney's fees on the amount of both notes.—*Robson v. Beasley*, La., 48 So. Rep. 891.

95. MORTGAGES—Foreclosure by Action.—A mortgage trustee is entitled to judgment of foreclosure on proving that outstanding valid obligations were issued under the mortgage, and that the mortgagor made default in their payment.—*Knickerbocker Trust Co. v. Oneta, U. & R. S. Ry. Co.*, N. Y., 80 N. E. Rep. 568.

96. MUNICIPAL CORPORATIONS—Damages for Laying Out Street.—An agreement by property owners along a proposed street held not to affect the running of limitations within which they must sue for the award of damages for the taking of land for the proposed street.—*Averill v. City of Boston*, Mass., 80 N. E. Rep. 588.

97. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A city is responsible for injury caused by a defective sidewalk, though the person injured was infected with a disease which aggravated the injury.—*City of Roswell v. Davenport*, N. Mex., 89 Pac. Rep. 286.

98. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A municipal corporation is charged with the duty of exercising reasonable care to see that its sidewalks are in reasonably safe condition, and cannot relieve itself of that duty by permitting a property owner to have a coal hole in the walk.—*City of Chicago v. Jarvis*, Ill., 80 N. E. Rep. 1079.

99. MUNICIPAL CORPORATIONS—Defective Sidewalks.—In an action for injuries caused by a defective sidewalk, evidences as to the condition of the stringers six weeks after the accident was admissible on the issue of their condition at the time of the accident.—*Miller v. Town of Canton*, Mo., 100 S. W. Rep. 571.

100. MUNICIPAL CORPORATIONS—Defective Sidewalks.—Whether a city was guilty of negligence in maintaining a concrete incline from a curb, and whether a pedestrian injured while stepping thereon was guilty of contributory negligence, held for the jury.—*Stratton v. City of New York*, 108 N. Y. Supp. 358.

101. MUNICIPAL CORPORATIONS—Meetings of City Council.—Where a city council was authorized to meet on the first Monday of each month, the adjournment of a meeting until the succeeding Monday evening held in effect the calling of a special meeting.—*State v. Ross*, Wa. h., 89 Pac. Rep. 158.

102. MUNICIPAL CORPORATIONS—Power of Legislature.—A municipality has no power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority over streets, highways, or public grounds.—*State v. Board of Park Com'rs of City of Minneapolis*, Minn., 110 N. W. Rep. 1121.

103. MUNICIPAL CORPORATIONS—Vacation of Street.—Where a party has no abutting property on a street about to be closed, and the closing will not shut off her property from access to a public street, she has no public easement in the street, and can suffer no actionable damage by reason of the closing.—*Reis v. City of New York*, N. Y., 80 N. E. Rep. 573.

104. NAVIGABLE WATERS—Riparian Rights.—The state owning the shore lands of a navigable lake held entitled to complain of an obstruction placed in the navigable waters of the lake as an interference with its riparian and littoral rights.—*Van Siclen v. Muir*, Wash., 89 Pac. Rep. 189.

105. NEGLIGENCE—Escaping Gas.—When damage to trees on a boulevard was caused by a leak due to the action of a frost, and the escape of gas was not discovered until June of the same year, the maxim "*res ipsa loquitur*" applies.—*Gould v. Winona Gas Co.*, Minn., 111 N. W. Rep. 254.

106. NOVATION—Operation and Effect.—Where a corporation as creditor accepts in payment of a debt the note of a third party, together with valuable security, a novation is affected, and it can thereafter look only to the substituted debtor for reimbursement.—*Security Warehousing Co. v. American Exch. Nat. Bank*, 103 N. Y. Supp. 899.

107. OFFICERS—Creation of Office.—When such amendment to the constitution creates a public office, such office may be filled by vote of the electors at the same election at which the amendment is adopted.—*State v. Winnett*, Neb., 110 N. W. Rep. 1118.

108. PARTIES—Oral Stipulations.—The rule that oral stipulations will not be enforced does not apply where an oral agreement to allow an amendment was testified to before the court and was not in dispute.—*Solomonovich v. Denver Consol. Tramway Co.*, Colo., 89 Pac. Rep. 57.

109. PHYSICIANS AND SURGEONS—Malpractice.—Negligence of surgeon in determining to perform operation held to be determined by reference to facts then known or which ought to have been known, and not by reference to knowledge afterwards acquired.—*Staloch v. Holm*, Minn., 111 N. W. Rep. 264.

110. PLEADING—Objection to Evidence.—Where the contract to be enforced is unreasonable in its terms and void under the statute of frauds, and the acts done are not such that damages would be an inadequate remedy, objection to evidence thereunder is properly sustained.—*Haffner v. Dobrinski*, Okla., 88 Pac. Rep. 1042.

111. PRINCIPAL AND SURETY—Diversion of Security.—Surety, in order to escape liability on the ground of diversion by the creditor of property pledged by the principal, must plead and prove the creditor's knowledge of relationship of principal and surety.—*Crosby v. Woodbury*, Colo., 89 Pac. Rep. 84.

112. RAILROADS—Care Required in Carrying Passengers.—It is a carrier's duty to use a very high degree of care to safely transport its passengers, doing all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted consistent with the practical operation of its cars.—*Chicago City Ry. Co. v. Shreve*, Ill., 80 N. E. Rep. 1049.

113. REFERENCE—Authority During Vacation.—Anything done by a judge of a district court in *quo warranto* proceeding which will be valid if done in term time is not invalid because done outside of a regular term of such court.—*Territory v. Armiño*, N. Mex., 89 Pac. Rep. 267.

114. **REFERENCE—Marketability of Title.**—In a summary proceeding to enforce payment under a judicial sale of land, which is resisted on the ground that the title is not marketable, a reference on the court's own motion held not necessary in the absence of a request.—*Wanser v. De Nyse*, N. Y., 80 N. E. Rep. 1098.

115. **REFORMATION OF INSTRUMENTS—Mistake in Deed.**—A deed of trust for a debt on three tracts of land by mutual mistake includes a certain tract when another was intended. The trustee sold the tracts and made a deed to the purchaser, who was a creditor. Held, that the deed of trust, but not the trustee's deed could be reformed at the suit of the creditor.—*Harper v. Combs*, W. Va., 56 S. E. Rep. 902.

116. **REMOVAL OF CAUSES—Stay of Proceedings.**—Where cause is removed from state to federal court, proceedings in the state court will be stayed until the delays for an appeal from a judgment against plaintiffs in the federal court have expired.—*Ferriday v. Middlesex Banking Co., La.*, 43 So. Rep. 403.

117. **SHERIFFS AND CONSTABLES—Conversion.**—In an action for conversion of wood, it was not necessary for defendant to plead that he relied on plaintiff's statement in having the wood sold under execution, in order to admit these facts as evidence to prove an estoppel.—*Fernberg v. Allen*, 103 N. Y. Supp. 339.

119. **SPECIFIC PERFORMANCE—Conditional Sales.**—The mere fact that a purchaser of goods by conditional sale was in need of the goods at the time of retaking by the vendor held not to make the retaking wrongful.—*Flaherty v. Ginsberg*, Iowa, 110 N. W. Rep. 1050.

120. **SPECIFIC PERFORMANCE—Weight of Evidence.**—In an action to compel the conveyance of a half interest in land, evidence held to show that plaintiff's interest was limited to one-half of the oil and gas therein after the satisfaction of a mortgage out of the first oil produced.—*Carter v. Estep*, Ky., 100 S. W. Rep. 308.

121. **STATES—Action Against Commissions.**—*Mandamus* against a commission created by the state to represent it held virtually an action against the state, and therefore not maintainable.—*Wilson v. Louisiana Purchase Exposition Commission*, Iowa, 110 N. W. Rep. 1045.

122. **STREET RAILROADS—Injury to Alighting Passenger.**—A street railway company held not negligent in stopping its car for plaintiff to alight at a point where the street, though appearing to be all right, was in fact soft, and sunk under plaintiff's weight as she stepped down from the car.—*Rose v. Boston & N. St. Ry. Co.*, Mass., 80 N. E. Rep. 580.

123. **TAXATION—Doctrine of Relation.**—The doctrine of relation does not apply to a purchaser of lands from the United States so that his title should be carried back to the date of the presentation of the scrip on which it was located, to render the lands subject to taxation.—*State v. Itasca Lumber Co.*, Minn., 111 N. W. Rep. 276.

124. **TELEGRAPHS AND TELEPHONES—Liability for Delayed Message.**—Telegraph companies held liable for loss sustained by the failure to deliver messages within reasonable time, notwithstanding stipulation in contract of carriage.—*Blackwell Milling & Elevator Co. v. Western Union Telegraph Co.*, Okla., 89 Pac. Rep. 235.

125. **TENANCY IN COMMON—Adverse Claim.**—A tenant in common out of possession can rely on the possession of his co-tenant as one holding for the benefit of all until some act is done evidencing an adverse claim.—*Oneal v. Stimson*, W. Va., 56 S. E. Rep. 899.

126. **TRADE-MARKS AND TRADE-NAMES—Extent of Right Acquired.**—The fact that a certain manufacturer of cheese has a trade-mark used on all its products does not destroy its right to the exclusive use of a certain trade-name as applied to its cream cheese.—*International Cheese Co. v. Phenix Cheese Co.*, 103 N. Y. Supp. 862.

127. **TRESPASS—Instructions.**—In trespass for the removal of a part of a wall between two buildings, an instruction that, if defendant failed to exercise ordinary care in removing the wall, plaintiffs were entitled to re-

cover, held erroneous.—*Howie v. California Brewery Co.*, Mont., 88 Pac. Rep. 1007.

128. **TRIAL—Harmless Error.**—In action by an insurance company against a railroad for money paid by plaintiff on a policy for loss of an elevator caused by fire from defendant's engine, refusal of requested argumentative instruction held harmless.—*Etna Ins. Co. v. Missouri Pac. Ry. Co.*, Mo., 100 S. W. Rep. 569.

129. **TRIAL—Value of Legal Services.**—In an action for legal services, the court properly refused to instruct the jury that in determining the value of the services, they were not confined to the evidence, but might rely upon their own judgment as to their value.—*Morehead's Trustee v. Anderson*, Ky., 100 S. W. Rep. 340.

130. **TRIAL—Verdict—Presumptions and Intentments** will be indulged in in favor of a general verdict, but none will be indulged in in favor of the answers to special interrogatories.—*Inland Steel Co. v. Smith, Ind.*, 80 N. E. Rep. 549.

131. **TRUSTS—Public Lands.**—An assignment of a trustee's right to purchase land from the state held to transfer all the right of the beneficiary to purchase, though the trusteeship might continue in the assignees.—*Hotchkin v. Russell*, Wash., 89 Pac. Rep. 183.

132. **VENDOR AND PURCHASER—Bona Fide Purchaser.**—The fraud by which an administrator buys, through a person interposed, the property of the succession under his administration cannot affect innocent third person or his vendee, though the vendee be the administrator himself.—*Chaffee v. Minden Lumber Co.*, La., 43 So. Rep. 397.

133. **WAREHOUSEMAN—Conversion of Property.**—That a husband deposited goods owned by him in warehouse in the name of his wife held not to justify the warehouse company in delivering the goods to her where they were not induced to do so for that reason.—*Schroeder v. Reinhardt*, Mo., 100 S. W. Rep. 595.

134. **WATERS AND WATER COURSES—Appropriation.**—An appropriator of water held to have a reasonable time in which to complete his appropriation in proportion to the extent of his arable land.—*Seaward v. Pacific Live Stock Co.*, Oreg., 85 Pac. Rep. 963.

135. **WATERS AND WATER COURSES—Irrigation.**—An upper riparian proprietor has no right to use the waters of a stream for irrigation by means of a ditch so porous that none of it is returned to the stream, in the absence of prior legal appropriation.—*Nielson v. Sponer*, Wash., 89 Pac. Rep. 155.

136. **WATERS AND WATER COURSES—Municipal Water Charges.**—Water board held entitled to make reasonable charge against property owner who has installed system and connected it at his own expense with water mains, though he may not take any water except in case of fire.—*Gordon & Ferguson v. Doran*, Minn., 111 N. W. Rep. 272.

137. **WATERS AND WATER COURSES—Riparian Rights.**—Low bottom lands along a stream, underlaid with an underground stream, which is a part of the surface stream, are not part of the bed of the stream, and therefore nonriparian, where they have been cultivated for many years.—*Anaheim Union Water Co. v. Fuller*, Cal., 88 Pac. Rep. 978.

138. **WILLS—Construction.**—Will creating a trust for the benefit of testator's son G, remainder to testator's "right heirs at law" in case G died without issue, held to vest such remainder in testator's heirs as ascertained at the time of G's death.—*Brown v. Wright*, Mass., 80 N. E. Rep. 612.

139. **WILLS—Probate.**—The order of a probate court vacating the probate of a will and resetting the matter for hearing at a future day is not such a final order or judgment as will sustain an appeal.—*Schofield v. Thomas*, Ill., 80 N. E. Rep. 1053.

140. **WITNESSES—Burden of Proof.**—The statute prohibiting a party from testifying to statements of a deceased person does not apply to actions by or against corporations.—*San Antonio Light & Publishing Co. v. Moore*, Tex., 101 S. W. Rep. 967.